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STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

MARQUETTE BUILDING
243 WEST CONGRESS, SUITE 256
DETROIT, MICHIGAN 48226-3259
TELEPHONE (313) 961-6585
FAX (313) 961-5819
WWW.AGCMI.COM

ROBERT L. AGACINSKI
GRIEVANCE ADMINISTRATOR

ROBERT E. EDICK
DEPUTY ADMINISTRATOR

CYNTHIA C. BULLINGTON
ASSISTANT DEPUTY ADMINISTRATOR

ASSOCIATE COUNSEL
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JOHN K. BURGESS

February 25, 2011

Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RECEIVED
FEB 28 2011
CORBIN DAVIS
CLERK SUPREME COURT

Re: ADM 2006-38
Proposed Amendments of Subchapter 9.100 et seq.

Dear Mr. Davis:

Writing solely on my own behalf, I am submitting these comments to the proposed revisions of Chapter 9 of the Michigan Court Rules (the attorney disciplinary procedural rules) published for comment under ADM file no. 2006-38.

MCR 9.128 (Limitations of Assessment of Costs)

It is my position that the amendment proposed by the AGC, and reluctantly published by the Court, actually describes the state of the law as it should be defined, even under the present rules. However, because the ADB, the state bar, and others believe there is the ability of the ADB to sanction the litigating attorneys who participate in a discipline proceeding, I am requesting this amendment as a clarification of the rule.

I believe there is no ability for hearing panels or Board members to sanction the litigating attorneys because these bodies do not have contempt powers necessary to enforce such sanctions. In Grievance Administrator v. Fieqer, 476 Mich.231, the Court clearly spelled out that the Board does not possess those powers that belong exclusively to the judicial branch. The Court specifically said, "The ADB is an administrative body," (p. 253) In this regard the Board and its panels are like administrative law judges or district court magistrates, who have judicial functions, but do not have the power to sanction litigating attorneys. Reliance on the argument that MCR 9.115(A), which indicates that practice and procedure of a non-jury civil trial applies to these proceedings, ignores the fact that the bench in those non-jury civil proceedings

does have contempt powers. So does the federal bench, which was also alluded to in Mr. Danhof's letter.

The entire discipline system, including hearing panels and the Board itself, solely has jurisdiction over an attorney's license. That jurisdiction only attaches when the court rules are followed involving the initiation of the case, the investigation of the case and the due process requirements of a formal proceeding. These requirements are not met when there is an attempt at a summary disposition, such as imposing a sanction upon the litigating attorneys. Panels and the Board do not have jurisdiction over the litigating attorneys during these hearings or arguments since the procedural requirements have not been observed.

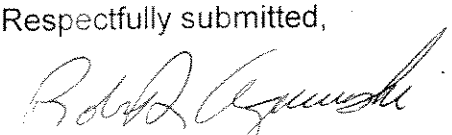
Panels and the Board are not without recourse, if they believe the behavior of the litigating attorneys was improper. MCR 9.131 provides the remedy for any perception of misconduct by litigating attorneys.

The problem isn't merely the number of times the issue of sanctions has been litigated, although I have been involved in two Board arguments recently on this very issue. This office often receives the threats of the filing of such motions, and this has had a deleterious affect on my staff.

Finally, on principle, it troubles me that a sister organization -the -ADB- which is part of the same discipline system as the AGC, created from the same original agency, with the same funding source and the same supervisors (the Court) would have the power to sanction its parallel agency. Some sanction requests involve complaints about decisions made by the Commissioners in exercising their discretion to prosecute. The O'Connor case, provided to the Court in Mr. Danhoff's letter, is exactly such a claim. Yet the Commissioners are appointed by the same body as the Board members. I don't believe this system was designed so that one member was superior to the other. I believe the ability to sanction creates that relationship.

And so, I ask the Court to accept the proposal of the AGC, not to create a new immunity for my staff (even though this rule will also apply to respondents' attorneys) but because this is the way the law should already be understood.

Respectfully submitted,



Robert L. Agacinski
Grievance Administrator